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In The Supreme Court of the United States

OCTOBER TERM 1994

COLT INDUSTRIES OPERATING CORPORATION
INFORMAL PLAN FOR PLANT SHUTDOWN
BENEFITS FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE W. HENGLEIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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I. Respondents' Counter Statement of the Case Demonstrates Their Efforts to Erroneously Apply State and Federal Law.

Petitioner maintains that the revocation of the discretionary informal severance benefit policy that existed between 1962 and 1972 was effective under Pennsylvania law and that thereafter no policy, arrangement or other understanding existed upon the effective date of ERISA that could be transformed into a benefit plan under Section 3 of ERISA. Petitioner has done nothing but to marshal the facts of this case to demonstrate (i) that under Pennsylvania law no offer of a unilateral contract existed in 1972, let alone any sort of offer irrevocable on the basis of some estoppel-like argument and (ii) that 1972 action taken by Petitioner withdrew any practice (or "non-offer") that might have continued into 1975 and thereafter to become a "surrounding circumstance" within the holding of *Dillingham*.

Respondents' "COUNTER STATEMENT OF THE CASE," on the other hand, seems to be arranging the alleged facts of this case to support a state law remedy founded on ideas of "notice," "reasonableness" and "justness." Quite simply, reasonableness and justness had (and have) nothing to do with the existence (or lack thereof) of an offer of a unilateral contract under Pennsylvania contract law. Whether or not Respondents had notice of the withdrawal of such a policy is similarly irrelevant under Pennsylvania law because the policy was never an offer and, *per se*, created no rights.

What Respondents and the Third Circuit are doing are moving back and forth in time to pull actions forward and push law backward to give actions unintended and unexpected consequences years after the fact.

II. ERISA Must Not be Retroactively Applied to "Acts or Omissions" That Occurred and Concluded Prior to 1975.

Section I of Respondents' Brief in Opposition ("Brief"), entitled "THE THIRD CIRCUIT CORRECTLY APPLIED ERISA STANDARDS TO COLT'S CONDUCT PRIOR TO 1975," removes all doubt that the Third Circuit Court of Appeals is ordering the District Court for the Western District of Pennsylvania to apply the ERISA standards as prescribed by *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), to the employer's acts and omissions that occurred prior to 1975 to determine whether a plan within the meaning of ERISA Section 3 existed in 1982. The mandated application of *Dillingham* to *all* surrounding circumstances does not have simply the *effect* of an impermissible retroactive application of ERISA, but rather takes the form of a clear and direct mandate to the district court to apply ERISA standards to conduct that commenced thirteen years and concluded three years prior to the passage of ERISA and concluded ten years prior to the standards developed by the Eleventh Circuit in *Dillingham* to determine subject matter jurisdiction for ERISA.

Respondents contend that Petitioner has taken inconsistent positions with respect to the retroactive application of ERISA during the rather lengthy history of this litigation. Brief at 8-9. Such an assertion can only be a result of Respondents' failure to clearly understand Petitioner's position. Respondents contend that because Petitioner has attempted to demonstrate to this Court that the Third Circuit's position is that a plaintiff need only allege the existence of a plan after 1975 "even if the underlying events occurred before ERISA's effective date," Petition at 15, then Petitioner is arguing, contrary to its earlier position, that all underlying events of the *Henglein* litigation occurred before 1975. Petitioner's consistent position is, and always has been, that pursuant to the operation of ERISA Section 514(b)(1) the only relevant "acts or omissions" to which the legal

standards of ERISA may be applied are those that occurred "if at all" after January 1, 1975. Petitioner contends that a proper instruction to the district court to apply *Dillingham* standards to any acts or omissions occurring after 1975 ("if at all") will easily produce a judgment favorable to Petitioner.[1]

The Third Circuit has as much as held that additional evidence is necessary before the district court could make a finding of fact that a plan exists. [*Henglein I*, App. at 502]. When the Third Circuit first remanded this case to the district court "for any necessary presentation of further evidence" it erroneously ordered the district court to proceed to a judgment on the merits "[i]f after the presentation of any additional, relevant evidence, the employees have failed to prove . . . the existence of an employee benefit plan . . ." *Id.* Respondents have directly and affirmatively declined to enter further evidence of any acts or omissions occurring either before or after the passage of ERISA. [App. at 57].

Petitioner maintains that ERISA governs the Respondents' claims for benefits (if any validly exist) allegedly made in 1982, and that Respondents' claims accrued under and after the passage of ERISA. Petitioner, however, also maintains that the substantive provisions of ERISA may not be applied to determine the legal efficacy of actions taken between 1962 and 1972. These two positions are not inconsistent. ERISA Section 514(b)(1) simply provides that the existence (or rather the termination) of a plan prior to the

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[1] Respondents have not offered any evidence that Petitioner specifically and affirmatively represented at any time in the 8 years between the passage of ERISA and the plant shutdown that the Informal Plan existed. Not one of the 163 Respondents can demonstrate that he or she inquired as to the continued existence of a severance plan based upon a 1962, 1968 or 1969 document. Respondents would have the district court, the appeals court and this Court believe that in the 8 years following the passage of ERISA they relied in silence upon a letter some of them had seen 5 or 6 years before the passage of ERISA.

passage of ERISA must be determined by application of state law.

Respondents' employment terminated in 1982, after Petitioner shut down the facility at which they were employed. They filed their claims in 1982. It is as of 1982 that they must prove the existence of an ERISA Section 3 plan by using elements of proof developed under ERISA to conduct occurring after the effective date of ERISA. If there was any sort of policy in place on December 31, 1974, that continued to exist on January 1, 1975, because it had not been withdrawn, then the policy might be a useful "surrounding circumstance" under ERISA's *Dillingham* standards. The judgment as to whether a policy did or did not exist on December 31, 1974, must be made by an application of state law in effect at the applicable time.

In fact, Petitioner is somewhat puzzled by Respondents' reliance on *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838 (1st Cir. 1981). Brief at 10. In its quotation from Quinn, Respondents seem to rely on the word "permit" to mean that state courts have the option of applying state law "where that result most fairly accommodates the interest of all affected parties. . . ." *Quinn*, 639 F.2d at 840. The meaning of the word "permit," however, means that but for ERISA Section 514(b), courts would not be able to apply state law given the general preemptive scope of ERISA Section 514(a), thereby resulting in the unfairness of measuring conduct by standards developed *post facto*. In fact, reading either side of Respondents' *Quinn* quotation emphasizes the reason that Petitioner relied on *Quinn* in its petition. *See* Petition at 28-29. In pertinent part, *Quinn* states, on either side of Respondents' quotation, that "ERISA [is] inapplicable not only with respect to 'causes of action' arising prior to January 1, 1975, but also with respect to 'any act or omission' which occurred before that date. . .The clear practical import of the act or omission clause is to prevent past conduct

of pension plan fiduciaries[2] and contributors from being judged retroactively under the standards established by ERISA. . . ."[3] 639 F.2d at 841.

The net effect of the Third Circuit's remands to the district court is an order to apply the standards of *Dillingham* to all but one of the facts and circumstances attending this case, both before and after ERISA. Although Petitioner is arguing that *Dillingham* should be applied to post-ERISA facts and circumstances only, Petitioner has maintained that if a court must consider *all* surrounding circumstances by applying ERISA, it should not do so selectively. Petition at 29. The effective withdrawal of the Informal Plan under Pennsylvania law in 1972 before Petitioner (or anyone) ever heard of ERISA is certainly a surrounding circumstance to consider having more legal effect than a mere indication of intent.

III. Petitioner Was Not Subject to Any Pennsylvania State Law Applicable to Funded Pensions Prior to the Passage of ERISA, Nor Was Petitioner Subject to Any of the Notice or Fiduciary Standards of ERISA After the Passage of ERISA.

As explained in the Petition, nothing having legal effect existed under Pennsylvania law prior to or at the time of the

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[2] Petitioner asserts also that it was never a fiduciary with respect to either a state governed trust before ERISA or a "plan" after the effective date of ERISA.

[3] In fact, Justice Stevens very recently wrote that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. [footnote omitted] Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted. [footnote omitted] For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal' [citation omitted]." *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497 (1994).

passage of ERISA that would impose upon Petitioner any contractual obligation to Respondents. Petition 26-27.[4] Under the facts of this case, "the 'offer' or promise was nothing more than an illusion, [therefore] nothing existed, let alone anything that was enforceable." *Id.*[5] The foregoing represents Petitioner's only state law argument, the essence of which is that nothing ever existed under Pennsylvania law to which Respondents could attach any legal rights or remedies and that withdrawal of the optional, totally discretionary policy known as the "Informal Plan" was proper and totally effective under Pennsylvania law. *Morosetti v. La. Land & Exploration Co.*, 564 A.2d 151, 152 (Pa. 1989), ("[i]t is basic contract law that one cannot suppose, believe, suspect, imagine or hope that an offer has been made. . . the employees . . . could not show, other than an internal consideration of policy for what might be given, if and when [the employer] announced a policy for all employees. It is not sufficient to show only that they had a policy.")

Section II of Respondents' Brief simply begs the question. The cases upon which Respondents rely have nothing to do with the particular facts of this case. The cases of *Levitt v. Billy Penn Corp.*, 283 A.2d 873 (Pa. Super. 1971), and *Lowe v. Jones*, 200 A.2d 880 (Pa. 1964), dealt with the judicial construction of disputed terms of existing trusted plans that held assets from which benefits would be paid. Nothing of the sort exists (or ever existed) in this case; a

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[4] Each of the 1962, 1968 and 1969 versions of the Informal Plan contained essentially the same type of procedural mechanism. Upon the termination of employment a line manager could elect to submit a "proposal" for an employee to receive benefits through the head of the department to a committee comprised of heads of each of the company's five departments. The committee would evaluate each "proposal" after input from someone with the ability to provide "a personal evaluation of the request." *See* App. at 119-22 (the 1962 version), App. at 127-28 (the 1968 version) and App. at 132-35 (the 1969 version).

[5] *See also id.*, n.22, for a clear illustration of this highly relevant pre-1975 state law concept.

plan, let alone one funded by a trust, never existed. To attempt to apply *Levitt* and *Lowe* to the facts of this case assumes a resolution of the very issue being litigated for the past 12 years: whether a plan existed in 1982 pursuant to the terms of which Respondents had any rights.

Respondents' attempt to rely on axiomatic hornbook law pertaining to the withdrawal of general offers (*i.e.*, newspaper advertisements and contest rules published to an indeterminate class of offerees as described in Section 2.4 of *Corbin on Contracts* (1993)) is inapposite to the facts of this case. Like Respondents' use of Pennsylvania case law applicable to the terms of existing funded trusteed pension plans, the use of hornbook law applicable to effective withdrawals of class offers once again begs the question: whether or not an offer even existed, the resolution of which might then trigger an inquiry as to whether the offer was properly withdrawn under Pennsylvania law. It is this very law that the Third Circuit mandates shall not be applied.

IV. The Fiduciary Standards Established by ERISA Can Only Apply if There Exists a Plan Under ERISA.

Respondents yet again beg the question and devote nearly five pages of the Brief to a discussion of fiduciary duties under ERISA. Such a discussion might be useful pursuant to a claim brought by *plan* participants against a *plan* fiduciary for a breach of ERISA Section 404. Again, the key issue being litigated here is the existence of a plan under ERISA pursuant to a proper application of the standards of *Dillingham*.[6] The determination of whether plan benefits are due, whether fiduciary standards are breached or whether

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[6] Respondents' Brief does not mention *Dillingham*, let alone demonstrate to this Court why it should not exercise its powers of *certiorari* to determine whether a district court under mandate may or may not establish subject matter jurisdiction by selectively applying *Dillingham* to events occurring before the passage of ERISA to create the requisite elements of a "plan."

proper notice of a plan termination was given are appropriate and useful only after a determination of the threshold issue of whether or not a plan exists. [7] Pages 19 through 23 of the Brief simply are irrelevant.

V. Respondents' Conception of the "Law of the Case" Doctrine is Erroneous.

Section IV of Respondents' Brief suggests that Petitioner's vigorous (and at the district court level successful) litigation to prevent the retroactive application of ERISA is a violation of the "law of the case" doctrine and goes so far as to suggest that sanctions, under Rule 11 of the Federal Rules of Civil Procedure, might be in order because Petitioner "should not again be allowed to violate the Law of the Case doctrine by rearguing before the Supreme Court the issues long since resolved in *Henglein I*." Brief at 29. First, Respondents erroneously believe that a party to the litigation can violate the "law of the case" doctrine. Justice Holmes of this Court, however, long ago said that the ' "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the *practice of courts* generally to refuse to reopen what has been decided, not a limit to their power. [citations omitted] Of course this Court [the Supreme Court], at least, is free when the case comes here." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added). Second, Respondents' contention that Petitioner should be prohibited from rearguing before this Court "issues long since resolved" by the

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[7] Apparently in some sort of attempt to demonstrate that if one individual who was terminated in 1968 could collect benefits under the Informal Plan then an enforceable plan existed, Respondents cite the example of Arnold Stewart, who was "peremptorily denied benefits". Brief at 3 and "filed suit in State Court. . ." Brief at 17. The information involving Mr. Stewart is found in Plaintiffs' "Additional Exhibit" 28. App. at 155. This exhibit was never offered into evidence at trial and therefore is not part of the record. *See* App. at 149 (involving Plaintiffs' "Additional Exhibits" 24-36).

Third Circuit would seem to indicate that Respondents believe this Court's appellate jurisdiction is somehow limited by decisions of the Third Circuit Court of Appeals. Such an assumption, of course, is incorrect.

VI. There is no Rule That the United States Supreme Court Cannot Hear an Interlocutory Appeal.

Respondents devote half a page of the Brief to defining "final judgments" and "final decisions." Brief at 29-30. There is no requirement that a final judgment exist before this Court will issue a writ of *certiorari* (although the existence of a final judgment is often the case). Nevertheless, if an important and clear-cut issue of law that is fundamental to the further conduct of the case exists, and that issue would otherwise qualify as a basis for *certiorari*, this Court has granted review. *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) *citing and quoting United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In fact, Petitioner relied upon *Land v. Dollar* to remind this Court of its decision that a district court may proceed to a decision on the merits of a case in order to determine whether or not it has jurisdiction, and that simply because the decision involves a determination on the merits does not alter the fact that a jurisdictional decision is being made. Petition at 19, *quoting Land v. Dollar*, 330 U.S. at 739. In *Land v. Dollar*, a district court dismissed Plaintiffs' claim for lack of jurisdiction and the appeals court reversed. This Court granted *certiorari* "because of the importance of the question presented," *id.* at 734, even though "the judgment below was not a final one. . . ." *Id.* n.2.

In attempting to persuade this Court that *certiorari* would be improper because *Henglein III* does not represent a "final appealable Order," Respondents correctly noted that "*Henglein III* in no way 'ended the litigation.'" Brief at 30. Petitioner believes that until this Court issues a writ of *certiorari* and instructs the Third Circuit as to both what is the proper subject matter jurisdiction under ERISA in a claim-for-benefits case and the correct nonretroactive appli-

cation of ERISA to the facts of this case, there will be no foreseeable end to this litigation (nor can there be under the Constitution of the United States, for there must in reality be subject matter jurisdiction for the commencement and conclusion of any litigation) as the Third Circuit continues to instruct the district court to render a judgment in a dispute over which it has no jurisdiction.

CONCLUSION

Petitioners have presented sound and convincing reasons why this case is appropriate for *certiorari*, which Respondents have failed to refute. For all the reasons set forth in this Reply to Respondents' Brief in Opposition, and in the Petition for *Certiorari*, this Court should grant *certiorari*.

Respectfully submitted,

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